SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652813/2012 **E** Hon. Andrea Masley
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 **E**

INSURERS' MEMORANDUM OF LAW SEEKING PARTIAL REVIEW OF THE MEMORANDUM AND ORDER OF SPECIAL REFEREE MICHAEL DOLINGER (Regarding Motion to Compel Production of Underlying Litigation & Settlement Materials)

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I. PRELIMINARY STATEMENT

Pursuant to CPLR § 3104(d), the Insurers submit this application seeking review of the portion of the Special Referee's February 26, 2019 Memorandum and Order denying their Motion to Compel Underlying Litigation and Settlement Materials. By way of separate applications filed today, the Insurers seek review of certain additional issues improperly determined by the Special Referee in connection with two other motions. The Insurers submit that the Special Referee's rulings on these issues are contrary to the applicable law and discovery standards and, therefore, merit review and reversal by this Court.

Relevant here, the Special Referee erred in denying the Insurers' motion to compel production of the underlying defense and settlement files maintained by the National Football League and NFL Properties LLC's (collectively, the "NFL Parties") defense counsel. These materials constitute the foremost source of information reflecting the NFL Parties' evaluation of the underlying claims and defenses, and their reasons for entering into an uncapped class settlement that is predicted to pay out more than $1 billion over its 65-year term. The Special Referee failed to consider the interplay between the NFL Parties' contractual obligation to cooperate with the Insurers, which requires the NFL Parties to share defense and settlement materials, and the common interest doctrine, which allows the NFL Parties do so [redacted]. In any event, the NFL Parties have placed these materials directly at issue in this lawsuit. These highly relevant materials must be produced now to ensure an efficient discovery process and avoid unfair prejudice to the Insurers.

For the reasons set forth herein, and in the original motion papers before Special Referee Dolinger, the Insurers request that the Court reverse the Special Referee's denial of their motion to compel the underlying defense files.

II. FACTUAL BACKGROUND

A. THE UNDERLYING LITIGATION

This insurance coverage dispute arises from underlying lawsuits consolidated in a multi-district litigation captioned In Re: National Football League Players' Concussion Injury Litigation, MDL 2323, in the United States District Court for the Eastern District of Pennsylvania (the "MDL Action"). The MDL Action includes thousands of claims brought by former NFL players and their families since July 2011 alleging certain neurological injuries and conditions that are alleged to be the result of concussive and subconcussive impacts sustained during their NFL careers. Several of the Insurers have incurred approximately $20 million in legal expenses for the NFL Parties' defense in the MDL Action, which is being provided primarily by the firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"). These expenses continue to accrue, and the NFL Parties continue to seek reimbursement.

After a mediation and settlement approval process, the District Court granted final approval of a class settlement in the MDL Action on May 8, 2015 (the "Settlement"). The Settlement encompasses funding by the NFL Parties[1] of: (1) a $75 million Baseline Assessment Program available to those former players who have not opted out of the class; (2) a $10 million fund for brain injury research; (3) an ***uncapped*** Monetary Award Fund to compensate former players for certain "qualifying diagnoses" (including CTE, ALS, Parkinson's Disease, Alzheimer's Disease, and certain forms of dementia) over a 65-year period; and (4) an attorneys' fee award of $112.5 million. The total amount of funding the NFL Parties will be obligated to pay under the Settlement is currently estimated by certain actuaries to be in the range of $1.4

[1] The settlement documents do not state, and the NFL Parties have refused to disclose, the apportionment of the settlement payments between the NFL and NFL Properties, respectively.

billion. See Ex. 2 at Ex. A to Affirmation of Christopher R. Carroll ("Carroll Aff."). The Settlement was entered into and approved without one deposition having been taken or a single page of discovery exchanged in the MDL Action.

To date (less than two years into the Settlement's 65-year term), 20,531 class members have registered for the Settlement, and over $629 million in awards have been authorized. There are several lawsuits by "opt-out" claimants, consisting of certain former NFL players and family members, which remain pending and subject to the NFL Parties' renewed motions to dismiss.

B. THE COVERAGE ACTION

1. Relevant Procedural Background

This lawsuit was filed in this Court on August 13, 2012 (the "Coverage Action"). After the NFL Parties' unsuccessful attempt to move the forum of this lawsuit from their home state of New York across the country to California, Justice Oing entered a Preliminary Conference Order on April 12, 2013. See Ex. 2, at Ex. B to Carroll Aff. Following extensive meet and confer efforts, the parties entered into a confidentiality agreement that was entered by the Court on May 22, 2013 (the "Protective Order"). See Ex. 2, at Ex. C to Carroll Aff. The parties then exchanged initial discovery requests and document productions relating to insurance issues.

Shortly thereafter, the underlying settlement efforts began to take shape. At the NFL Parties' request, the Insurers agreed to stand down on further discovery efforts in the Coverage Action and did not return to Court until two and a half years later, on November 16, 2015 (after the Settlement of the MDL Action had been finalized ***and*** approved by the federal court). During the November 16, 2015 conference, Justice Oing determined that discovery should re-commence and go "full speed ahead." See Carroll Aff., Ex. 2, at Ex. D at 24. At that time, the Court rejected the NFL Parties' concern that discovery in the Coverage Action could jeopardize

its defense in the opt-out lawsuits, specifically stating that the Protective Order would adequately shield confidential documents and that the Court would serve as the gatekeeper with respect to any third-party requests for such materials. See Carroll Aff., Ex. 2, at Ex. E at 5-6.

The Court subsequently denied the NFL Parties' formal motion to stay the case, issuing a written Decision and Order on November 1, 2016. See Ex. 2, at Ex. F to Carroll Aff. The NFL Parties filed a notice of appeal of the decision, and a motion to stay the discovery pending appeal, which was denied by the Court, and the NFL Parties abandoned their appeal.

With the case finally ready to proceed in earnest, four years after it was commenced, the parties filed amended and supplemental pleadings to account for developments in the interim. By way of Second Amended Counterclaims and Cross-Claims, the NFL Parties asserted the following causes of action against the Insurers (or certain subsets of them): 1) Breach of Contract as to the Duty to Defend; 2) Declaratory Relief as to the Duty to Defend; 3) Breach of the Duty to Indemnify for the Settlement; 4) Declaratory Relief as to the Duty to Indemnify; 5) Declaratory Relief as to Certain Insurers' Bad Faith Refusal to Consent to the Settlement.[2] See Carroll Aff., Ex. 2, at Ex. M at ¶¶70-100.

2. The Insurers' Efforts to Obtain Substantive Discovery

On February 1, 2017, the Insurers served their Second Omnibus Demand for Discovery and Inspection seeking documents and communications from the NFL Parties related to the MDL Action and the Settlement, which included all non-public underlying litigation materials

[2] This claim currently is asserted against ACE, Century, Continental Casualty, Continental Insurance, Discover, Guarantee, North River, Bedivere, St. Paul, TIG, Travelers Casualty, Travelers Indemnity, Travelers Property, U.S. Fire and Westchester.

possessed by the NFL Parties and/or their attorneys, such as defense counsel's evaluations of the NFL Parties' potential liability, the available defenses, the reasonableness of the Settlement, and any communications related thereto. See Ex. 2, at Ex. G (Request Nos. 28, 29, 89 and 90).

On March 17, 2017, the NFL Parties served their Objections and Responses to the Second Omnibus Requests, and responded to Request Nos. 28, 29, 89, and 90 by asserting a litany of objections, including on the basis of relevancy, attorney-client privilege and work product immunity, and advised that they were "not undertaking to search for or produce documents generated after the underlying litigation was initiated on July 19, 2011, or documents that came into NFL's possession after July 19, 2011, unless specifically indicated otherwise." See Ex. 2, at Ex. J to Carroll Aff. The NFL Parties also provided their proposed list of custodians and search terms to be used for electronic discovery collection purposes.

By letter dated May 31, 2017, the Insurers outlined various deficiencies in the NFL Parties' responses to the Requests, including that the NFL Parties had improperly refused to produce documents relating to their defense efforts and Settlement in the MDL Action and requested a "meet and confer" conference to attempt to resolve those issues. See Ex. 2, at Ex. K to Carroll Aff. The Insurers also objected to the NFL Parties' custodians and search terms and proposed supplemental custodians and terms to be used. Over the course of the next nine months, the parties engaged in extensive efforts to resolve discovery disputes via the exchange of numerous letters and several lengthy teleconferences, throughout which the NFL Parties maintained their blanket objections to the production of documents related to their defense in the MDL Action and the Settlement for which they are seeking coverage. See id. In early 2018, the parties met with the Court to discuss these issues, and it was agreed that the retention of a Special Referee would be beneficial. On April 27, 2018, the parties entered into a Stipulation for

Appointment of Referee to Supervise Disclosure Pursuant to CPLR § 3104, which designated the Honorable Michael H. Dolinger as Special Referee. The Court entered an Order appointing the Special Referee on April 30, 2018. See Ex. 7 to Carroll Aff.

3. The Discovery Motions

On August 21, 2018, the parties collectively submitted five discovery motions to the Special Referee. The Insurers seek review of issues addressed in only three of them. These motions include: 1) the Insurers' Motion to Compel Underlying Litigation and Settlement Materials; 2) the Insurers' Omnibus Motion to Compel the use of certain search terms for electronic discovery materials (among several other issues); and 3) the NFL's Motion to Compel reserves and reinsurance information from the Insurers (among several other issues). See Exs. 1 & 2 to Carroll Aff. The parties filed opposition papers to the respective motions on September 21, 2018 and the reply briefs on October 11, 2018. See Exs. 3 & 4 to Carroll Aff. On October 23, 2018, the NFL Parties filed an unscheduled surreply, to which the Insurers responded via letter to the Special Referee on October 29, 2018. See Exs. 5 & 6 to Carroll Aff.

Special Referee Dolinger heard a full day of oral argument on the discovery motions on November 27, 2018. In December and early January, the parties made supplemental submissions on certain issues that were addressed during oral argument.

4. The February 26, 2019 Opinion

On February 28, 2019, Special Referee Dolinger issued a Memorandum and Order dated February 26, 2019 on the pending discovery motions (the "Order"). See Ex. 8 to Carroll Aff. Relevant to this application, the Special Referee denied the Insurers' motion to compel the underlying defense and settlement file, concluding that the cooperation clauses of the insurance contracts are "not a basis for setting aside either privilege or work-product immunity" and that

"on the current record the common-interest doctrine does not justify invasion of the attorney-client privilege of the League or the work-product immunity that it currently asserts." See id. at 11; 16. In addition, Special Referee Dolinger found that the Insurers' argument based upon the "at issue" waiver doctrine "cannot prevail in the current state of this lawsuit, although future development might conceivably alter that outcome." Id. at 16.

With respect to the Insurers' motion to compel miscellaneous relief from the NFL Parties, including supplemental custodians and search terms for electronic discovery collection, Special Referee Dolinger granted the motion in part and required the NFL Parties to include an additional [redacted] and use an additional [redacted]. See id. at 50-53. Without providing any specific explanation, the Special Referee rejected the Insurers' request for [redacted] other search terms.

The Special Referee also denied the Insurers' motion to compel any indemnity agreements (and related correspondence) between either NFL Party and the Member Clubs or [redacted] on the basis that there is "no litigable dispute." Id. at 56. The Special Referee based this conclusion upon the representations of the NFL Parties at oral argument that any indemnity agreements with [redacted] (and related correspondence) would be produced but that there were no indemnity agreements with the Member Clubs that would be pertinent to the current case. Id. By way of a separate application, the Insurers seek review of these rulings.

Finally, Special Referee Dolinger granted in part and denied in part the NFL Parties' motion to compel. As relevant here, His Honor concluded that "reserve information is relevant, for discovery purposes, to League claims of bad faith and any other claims or defenses pertaining to the reasonableness of the MDL settlement." Id. at 73. In addition, the Special Referee held that "the production of reinsurance policies themselves is seemingly mandated by section

3101(f)" and that reinsurance communications are "discoverable to the extent that a carrier has asserted 'failure to disclose' defenses or is targeted by [a] bad-faith claim." Id. at 75-76. The Insurers also seek review of these determinations by way of a separate application.

III. ARGUMENT

A. STANDARD OF REVIEW

CPLR § 3104(d) allows for review of an order made by a referee or special master. Pursuant to the order appointing the Special Referee in this matter, an application for review is timely if made within fourteen days after the ruling under review was issued in writing to the parties via e-mail. The parties received the Special Referee's Order via e-mail on February 28, 2019 and, therefore, this application is timely. See Ex. 8 to Carroll Aff.

The special referee's decision will be upheld only if it is both supported by evidence in the record and a proper application of the law and discovery standards. See Stark v. Reliance Nat'l Indem. Co., 273 A.D.2d 148, 148 (1st Dep't 2000). However, if the decision is contrary to the applicable law or standards, it must be vacated. Surgical Design Corp. v. Correa, 21 A.D.3d 409, 411, 799 N.Y.S.2d 584, 586 (2d Dep't 2005) ("Since the Referee's order is not supported by the record, the Supreme Court should have granted plaintiff's motion pursuant to CPLR 3104 to vacate it."); Those Certain Underwriters at Lloyd's, London v. Occidental Gems, Inc., 11 N.Y.3d 843, 873 N.Y.S.2d 239, 901 N.E.2d 732 (2008) (explaining that trial court had discretion to disaffirm referee's findings of fact, despite arguable support for those findings in the record).

For the reasons discussed herein, the Insurers seek reversal of Special Referee Dolinger's Order denying their motion to compel the underlying litigation and settlement materials on the basis that it is contrary to New York law and the broad standard for discovery in this Court.

B. THE UNDERLYING LITIGATION MATERIALS ARE RELEVANT AND DISCOVERABLE

In response to the Insurers' discovery requests, the NFL Parties refused to produce any substantive documents regarding the defense and settlement of underlying claims, including defense counsel's investigation efforts, their assessment of the potential liability posed by the claims, the potential defenses to those claims, and the bases for the NFL Parties' decision to enter into an uncapped 65-year class settlement. Despite New York's extremely broad discovery standard, and the fact that certain Insurers have paid about $20 million in costs in connection with defense counsel's efforts in the underlying litigation, the NFL Parties amazingly contend that these materials are not "material and necessary" to this pending lawsuit in which they seek reimbursement for their complete defense and settlement costs from the Insurers.

Special Referee Dolinger agreed with the Insurers that some of the requested materials would be relevant to issues in the coverage action, including "the extent of the [NFL Parties'] early knowledge (or lack thereof) of the risks of serious brain injuries from forceful contact on the football field and what steps the [NFL Parties] took to address or conceal the risk." See Ex. 8 at 10. The Special Referee then turned to an analysis of whether the responsive documents withheld by the NFL Parties were otherwise protected from disclosure.

Although the Insurers appreciate the Special Referee's recognition of the potential relevance of the NFL Parties' non-public defense and settlement materials, it is respectfully submitted that His Honor did not appreciate the significance and material relevance of this information to the Coverage Action. The crux of this entire case is whether the NFL Parties are entitled to insurance coverage – to the tune of hundreds of millions of dollars, if not a billion – for their defense costs and settlement payments in connection with the underlying litigation.

Substantive evaluations and documents created by defense counsel in the course of the MDL Action and the extensive settlement process are critical to the Insurers' ability to fairly litigate numerous defenses that could serve to preclude coverage or defeat the NFL Parties' claims, including: (i) whether the alleged injuries compensated under the Settlement occurred during the Insurers' policy periods; (ii) whether the NFL Parties were in possession of information reflecting historical knowledge of any risks of head trauma or efforts to conceal same from players and the public, as relates to defenses based upon known loss/loss in progress, the expected or intended injury exclusion, misrepresentation in policy applications or late notice; (iii) whether, with respect to certain Insurers, the NFL Parties violated the voluntary payment, consent-to-settle or other policy provisions by entering into the Settlement without prior consent; and (iv) whether certain Insurers acted in bad faith by declining consent to the Settlement. The fact that the NFL Parties did not provide one deposition or produce one page of paper discovery in the MDL Action makes these documents even more critical to the Insurers' defenses.

Even assuming that the NFL Parties could satisfy their burden to establish a general right to coverage under the policies, which is disputed, the Insurers would be obligated to pay only their respective shares of those defense costs (for those policies that may cover them) and settlement payments that are ***reasonable***. George Muhlstock & Co. v. American Home Assurance Co., 117 A.D.2d 117, 126 (1st Dep't 1986) (holding insurer "liable to the insured for the reasonable counsel fees and necessary expenses, as well as the cost of settlement, ***unless the settlement is unreasonable or exorbitant***") (emphasis added); In re Prudential Lines, Inc., 170 B.R. 222, 246 (S.D.N.Y. 1994) ("[T]he insurer need not indemnify its insured for a settlement which is either unreasonable . . . or which covers losses not falling within the ambit of the policy" and permitting discovery to insurer to challenge the reasonableness of settlement).

Here, the Insurers have been deprived of the opportunity to substantively evaluate the strength of the underlying claims, the viability of the NFL Parties' potential defenses, and the reasonableness of the Settlement as pertains to both the NFL and NFL Properties, two separate corporate entities that have distinct insurance coverage profiles. The requested documents that relate to the underlying defense (which has been paid for in large part by several of the Insurers) and settlement are unquestionably "material and necessary" to the determination of a number of coverage issues, including the reasonableness of the Settlement. As noted, the Insurers have had no opportunity to properly develop their defenses in this case because the NFL Parties have produced virtually nothing related to the defense and settlement of the MDL Action beyond publicly-filed materials that the Insurers could obtain directly from PACER.

The NFL Parties argue that the defense files are not relevant because the standard for assessing reasonableness of the Settlement is an "objective" one. Such an argument is without merit. At this stage of the case, the parties are not debating the merits of substantive issues or seeking the Court's input on the appropriate standards for determining whether coverage exists. The Insurers are seeking relevant discovery from the NFL Parties, as is their right under the CPLR. Regardless, it is difficult to imagine how a factfinder in the Coverage Action could consider the objective reasonableness of an uncapped class settlement (potentially in excess of $1 billion) for underlying claims that were not the subject of any discovery in the MDL Action, without the benefit of materials related to the NFL Parties' defense and settlement analysis.

The Insurers believe that defense counsel's files reasonably should include [redacted] regarding the risks of head trauma in the context of NFL football. The defense files also likely address various

practical considerations, including the intangible "cost" of bad publicity to the NFL Parties, which may have been a motivating factor in the decision to enter into the Settlement, as opposed to the actual threat of legal liability.

In sum, the Insurers have satisfied their burden to demonstrate that the NFL Parties' defense counsel's files are relevant under New York's broad discovery standards. The Insurers have a fundamental due process right to "present every available defense," which requires access to these materials. Lindsey v. Normet, 405 U.S. 56, 66 (1972). Relief from this Court is necessary because the documents contained in the requested defense files – which were gathered and/or created with millions of dollars of funding from certain of the Insurers – constitute the only source of this relevant information.

C. SPECIAL REFEREE DOLINGER ERRED IN DENYING THE INSURERS' MOTION TO COMPEL THE UNDERLYING LITIGATION AND SETTLEMENT MATERIALS

Having found the potential relevance of the underlying defense and settlement materials (thereby rendering them discoverable as a matter of law), the Special Referee could deny the Insurers' motion to compel only to the extent that a valid privilege or protection existed over the responsive documents. The Insurers respectfully assert that Special Referee Dolinger misconstrued the Insurers' arguments and the applicable law, which establish the inapplicability of attorney-client privilege and work product immunity over this universe of documents.

Special Referee Dolinger inaccurately characterized the Insurers' position to be as follows: (i) the cooperation clauses found in the Insurers' policies require the NFL Parties' to waive attorney-client privilege and/or work product immunity over their documents; or, separately, (ii) that the common interest doctrine requires the NFL Parties to disclose privileged materials to the Insurers. In other words, the Special Referee analyzed these two prongs independently and denied the Insurers' motion to compel by finding: (i) the cooperation clause

does not require invasion of the attorney-client privilege or work-product immunity; and (ii) the common interest doctrine does not mandate production of privileged documents or justify an automatic waiver of privilege. See Ex. 8 at 11-13.

To be clear, the Insurers do not contend that the cooperation clauses in the policies operate to destroy a policyholder's general right to protect privileged documents. Likewise, the Insurers do not contend that the common interest doctrine, itself, requires the NFL Parties to share privileged materials. Rather, the Insurers argue that the interplay between the contractual duty to cooperate under the policies (which ***requires*** the NFL Parties to provide the Insurers with all documents necessary to evaluate the underlying claims and the Settlement) and the common interest doctrine (which ***permits*** the sharing of privileged materials from underlying claims without risk of waiving privilege), operate to invalidate the NFL Parties' reliance on privilege as a basis for withholding relevant documents from the Insurers in the Coverage Action.

1. The Common Interest Doctrine and Cooperation Clauses Overcome The NFL Parties' Objections to Producing Clearly Relevant and Discoverable Documents

By entering into insurance contracts with the Insurers, the NFL Parties agreed to certain conditions precedent to coverage. One of the paramount requirements under the policies is that the insured cooperate with the insurer in the investigation, defense, and settlement of the underlying case and provide all relevant information and materials. Each of the Insurer's policies contains a provision generally requiring the NFL Parties to "cooperate with [the insurer] in the investigation, settlement, or defense of the claim or suit."

Recognizing that the purpose of these cooperation clauses "is to permit the insurer to investigate the legitimacy of a claim" Ashline v. Genesee Patrons Coop. Ins. Co., 638 N.Y.S.2d 217, 219 (3d Dep't 1996), New York courts have long instructed that an insured is ***required*** to

respond to an insurer's request for materials relating to the underlying claim, such that any unreasonable refusal to comply forms a valid basis upon which coverage may be denied. Dyno-Bite Inc. v. Travelers Co., 80 A.D.2d 471, 474, 439 N.Y.S.2d 558, 560-61 (4th Dep't 1981) ("The right to examine under the co-operation clause of the insurance policy, is much broader than the right of discovery under the CPLR. By it terms, the insured promises to render full and prompt assistance to discover the facts surrounding the loss and anything less results in a breach of contract."); James & Charles Dimino Wholesale Seafood, Inc. v. Royal Ins. Co., 656 N.Y.S.2d 325, 326 (2d Dep't 1997) (holding that disclaimer is appropriate based upon insured's "unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents"); New York Cent. Mut. Fire Ins. Co. v. Rafailov, 840 N.Y.S.2d 358, 360 (2d Dep't 2007) ("An unexcused and willful refusal to comply with disclosure requirements in an insurance policy is a material breach of the cooperation clause and precludes recovery on a claim.").

Despite their contractual obligations, the NFL Parties have long refused to cooperate with the Insurers, including throughout the negotiation of the Settlement. Many of the Insurers repeatedly requested access to underlying defense counsel's analysis at that time to independently evaluate the merits of the underlying claims and defenses, the basis for the Settlement, and whether the Settlement and its terms were, in fact, reasonable. These Insurers' requests were rebuffed, and the NFL Parties provided largely superficial oral defense briefings to support their unprecedented class settlement.

Years after the Settlement was consummated, the Insurers again requested the NFL Parties' defense and settlement materials in discovery within the context of this coverage litigation. Despite the NFL Parties request that the Insurers pay for the Settlement (and, indeed,

claim that certain Insurers have breached their contracts or acted in bad faith by not volunteering to pay for it), the NFL Parties again refused to produce highly relevant documents from their defense counsel's files. The NFL Parties claim they are relieved of their obligation to produce such information based upon the attorney-client privilege and/or work product immunity.

Importantly, however, the protections asserted by the NFL Parties over the withheld materials do not apply here because a tripartite relationship exists between the Insurers, the NFL Parties, and Paul Weiss (and any other retained defense counsel), which is rooted in their common interest in the defense of the MDL Action and opt-out claims. As acknowledged by Special Referee Dolinger, the common interest doctrine is not an "independent source of privilege or confidentiality," but is an "exception to the general rule that the presence of a third party destroys any claim of privilege" that permits the sharing of protected materials where there is a common legal interest among the parties. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 625 (2016); Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York, 284 F.R.D. 132, 139 (S.D.N.Y. July 3, 2012). New York courts have found that the common legal interest at issue need not be "total identity of interest." ACE Sec. Corp. v. DB Structured Prod., Inc., 40 N.Y.S.3d 723, 734-35 (N.Y. Sup. Ct. 2016) (recognizing that "the privilege may exist despite an adversarial relationship between the two parties asserting it," even where a future lawsuit between those parties is foreseeable).

Although the Special Referee made a point of "rejecting" the Insurers' argument that the common interest doctrine mandates production of privileged documents, the Insurers did not so argue. On the contrary, the Insurers have acknowledged that the New York case law addressing the common interest doctrine speaks in terms of ***permissive*** (rather than required) sharing of otherwise privileged information among two or more parties without waiver. See Ambac, 27

N.Y.3d at 622. As such, there appears to be no dispute that, under New York law, the common interest doctrine operates to ***permit*** the NFL Parties to share their non-public underlying defense materials with the Insurers without waiving any purported privileges as respects individuals and parties who do not share that common interest [redacted]

As discussed above, the documents in question are relevant and discoverable under New York's broad standard for discovery. The NFL Parties have a contractual obligation to cooperate with the Insurers and to share information and documents that bear upon the defense and settlement of the underlying litigation. The NFL Parties can share their internal, defense-related materials without fear of a privilege waiver because the common interest doctrine protects the transmission of the documents to the Insurers. Thus, the cooperation clause requires sharing of relevant underlying defense materials and the common interest doctrine preserves the privilege, even to the extent that the NFL Parties and the Insurers are now engaged in coverage litigation. See ACE Sec. Corp., 40 N.Y.S.3d at 734-35. The cooperation clause and the common interest doctrine work in tandem to ensure that relevant underlying defense-related materials (for which the insured seeks payment from the insurer) are provided to the insurer but also maintain their privilege with respect to parties outside the tripartite relationship.

The Special Referee erred in considering (and rejecting) the Insurers' arguments based solely upon the duty to cooperate and the common interest doctrine independently. As discussed below, the case law also supports the Insurers' position that the combined effect of the NFL Parties' contractual obligation under the policies and the legal principles underlying the common interest doctrine render the attorney-client privilege and work product immunity improper bases upon which to withhold clearly relevant and discoverable documents from the Insurers.

2. Existing Case Law Explains The Relationship Between The Common Interest Doctrine and the Cooperation Clause

Notwithstanding his undeniable efforts in addressing the multitude of complex discovery disputes presented by the parties, Special Referee Dolinger failed to appreciate how the common interest doctrine and duty to cooperate work together, and oversimplified the analysis of the case law on these two distinct concepts to deny the Insurers' motion. A review of the relevant case law supports the production of the requested materials.

Citing to J.P. Morgan Chase & Co. v. Indian Harbor Insurance Co., 947 N.Y.S.2d 17, 23 (1st Dep't 2012), the Special Referee quickly concluded that "the cooperation clauses in the insurance policies did not operate as waivers of [the insured's] attorney-client and work-product privileges" and separately rejected the Insurers' common interest argument. See Ex. 8 at 11. While the quoted language from J.P. Morgan is accurate, it is not instructive for several reasons.

First, J.P. Morgan is a reinsurance decision. The Special Referee disregarded this significant distinction, noting that the "reinsurance context of these decisions does not provide a meaningful basis for distinguishing the current case." See Ex. 8 at 11, n.12. That conclusion is contrary to the nature of the relationships at issue as well New York law. Reinsurers do not defend underlying lawsuits or participate in settlements of underlying claims. As such, the First Department has recognized that "the relationship between an insured and insurer stands in stark contrast to a relationship between an insurer and reinsurer." Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co., 40 A.D.3d 486, 491 (1st Dep't 2007).

Second, even within the confines of reinsurance, the trial court in J.P. Morgan explained that "[s]o long as the insurer produced ***all documents in its possession relevant to the underlying claim***, its duty under the cooperation clause was fulfilled." J.P. Morgan Chase & Co. v. Indian Harbor Ins. Co., 2011 N.Y. Misc. LEXIS 7400 (N.Y. Sup. Ct. May 26, 2011)

(emphasis added). Here, the NFL Parties have not provided "all documents in [their] possession relevant to the underlying claim," which are of even greater importance here in a claim for direct insurance coverage for defense and settlement costs. The Insurers are not seeking, and have never sought, the NFL Parties' attorney-client communications and work product documents as pertains to their claim for insurance coverage.

Third, the J.P. Morgan decisions (like the Special Referee's) simply conclude that neither the cooperation clause nor the common interest doctrine results in an "automatic waiver" of the attorney-client privilege to compel the policyholder to produce its defense-related materials. In neither case did the court consider the impact of the duty to cooperate and the common interest in tandem, as is necessary to fully address the Insurers' motion to compel.

The Supreme Court of Illinois relied upon the interplay of these two concepts in Waste Management, Inc. v. International Surplus Lines Insurance Co., 579 N.E.2d 322 (Ill. 1991), to compel production of the policyholder's underlying defense files in coverage litigation:

> Here, the cooperation clause imposes a broad duty of cooperation and is ***without limitation or qualification***. It represents the contractual obligations imposed upon and accepted by insureds at the time they entered into the agreement with insurers. In light of the plain language of the cooperation clause in particular, and language in the policy as a whole, ***it cannot seriously be contended that insureds would not be required to disclose contents of any communications they had with defense counsel representing them on a claim for which insurers had the ultimate duty to satisfy***.
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> Clearly, here both insurers and insureds had a common interest either in defeating or settling the claim against insureds in the [underlying] litigation. We believe that the communication by insureds with defense counsel is of a kind reasonably calculated to protect or to further those common interests. . . . a less flexible application of the doctrine effectively defeats the purpose and intent of the parties' agreement. Insureds and insurers share a special relationship; they are in privity of contract. In a limited sense, counsel for insureds did represent both insureds and insurers in both of the underlying litigations since insurers were ultimately liable for payment if the plaintiffs in the underlying action received either a favorable verdict or settlement. To deny discovery in this instance would

> be to disregard ***considerations of public policy which require encouragement of full disclosure*** by an insured to his insurer.

579 N.E.2d at 328.[3]

Other courts have similarly addressed the intertwined roles of the common interest doctrine and cooperation clause (something that has never been directly addressed in New York) and compelled policyholders to disclose underlying defense materials to their insurers. See, e.g., Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co., 654 F. Supp. 1334, 1365 (D.D.C. 1986) (concluding that while defense-related documents "may be privileged from discovery by party opponents in underlying claims, they cannot be privileged from carriers obligated to shoulder the burden of defend[ing] against those claims.");[4] EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18 (D. Conn. 1992) (compelling production of underlying defense counsel's documents and rejecting claims of attorney-client privilege). In EDO, the District of Connecticut explained:

> Given the fact that ***the insured is required to disclose to its insurer relevant information when it makes a claim for coverage under an insurance policy*** [i.e., comply with the cooperation clause], and given the fact that the insured is required to deal in good faith with its insurers, ***the insured cannot, in good faith,***

[3] The Waste Management decision has been criticized by certain other courts to the extent it suggested an automatic application of the common interest doctrine despite the fact that none of the insurers provided a defense to the policyholder in the underlying litigation, participated in the defense in any way, or had any communication with defense counsel. The facts here are quite distinguishable, where several Insurers have incurred millions of dollars in defense costs and pleaded with the NFL Parties for information throughout the defense and settlement efforts.

[4] The Indep. Petrochem. court rejected "a *per se* rule that a coverage dispute wipes out an insurer's ability to receive documents necessary in defending the underlying claims." Id. at 1366. The Order effectively applies such a rule here, although no such law exists in New York.

> ***entertain a reasonable expectation at the time the communication is made that the facts underlying those claim will not be disclosed to its insurer once a claim for coverage is made.***
>
> [The insured] argues that once an insurer denies coverage, it may use the attorney client privilege to shield from its insurer any communications with its counsel that were made in connection with the underlying action. ***Denying insurance coverage, however, does not in and of itself affect the reasonableness of an insured's expectation of confidentiality***. To hold otherwise would enable an insured to wield the attorney client privilege as a sword rather than a shield …
>
> It should be kept in mind, however, that the plaintiff insured is demanding that the insurer be held liable on the insurance policy. If the plaintiff is successful, the insurer will be required to fulfill its contractual obligation to the insured. For that reason, ***an insurer does not forfeit its right to full and fair disclosure merely by denying liability under the policy and, further, the insured's expectation of confidentiality as to its insurer does not become reasonable once the insurer denies coverage if the insured continues to demand coverage under its contracts for insurance***.

Id. at 22-23 (quoting Carrier Corp. v. Home Ins. Co., 1992 WL 478585 (Conn. Sup. Ct. Aug. 18, 1992) (emphasis added). The court further concluded that the common interest doctrine is an exception to the assertion of the work product immunity and that the policyholder could withhold defense materials from the insurer on the basis of work product only if defense counsel "prepared the[] documents in anticipation of a lawsuit with the defendant insurers." Id. at 24.

The documents sought by the Insurers are those prepared by defense counsel in connection with the ***underlying lawsuits***, not the coverage litigation. The NFL Parties are obligated to provide these defense and settlement related documents to the Insurers under the terms of their insurance contracts, and may do so freely by operation of the common interest doctrine. Unlike the reinsurance context or situations where the insurers have refused to participate in the defense, the Insurers have paid substantial sums to fund the efforts of the NFL Parties' chosen defense counsel and have actively requested information regarding the claims and settlement process. The documents in the defense files are directly relevant to almost every

claim and defense asserted by the NFL Parties and the Insurers in this coverage action and are "material and necessary" to the preparation of this case for dispositive motions and/or trial.

Although New York courts have not expressly considered the interplay between the common interest doctrine and the cooperation clause in the specific context of insurance coverage litigation, jurisdictions that have done so have rejected attempts by policyholders to withhold underlying defense counsel's files from their insurers, even where the parties are adverse in a coverage dispute. The cooperation clause requires disclosure of underlying defense-related materials to assist in the Insurers' investigation, defense, and evaluation of settlement opportunities in the underlying litigation. As Special Referee Dolinger observed, "the common interest doctrine is designed to permit . . . disclosure" of information among parties with a shared interest in defending a case. See Ex. 8 at 13. The Special Referee failed, however, to close the loop between these two principles. They can work hand-in-hand to ensure that insurers are provided with all relevant information about the underlying case (which they have been asked to defend and/or indemnify), but also, ensure that the privilege over such materials be preserved as to outside parties [redacted] The protection of any sensitive information produced by the NFL Parties is enhanced even further by the strict Protective Order entered by the Court, which will guard against the improper disclosure of materials to third parties.

Accordingly, the Insurers request that this Court reject this portion of the Special Referee Dolinger's Order and grant the Insurers' motion to compel the NFL Parties' underlying defense and settlement files subject to the Protective Order in this Coverage Action.

D. THE NFL PARTIES HAVE PLACED THEIR DEFENSE FILES "AT ISSUE"

In the alternative, the Insurers argued in their motion to compel that even if the requested underlying litigation materials are deemed subject to attorney-client privilege or the work

product immunity with respect to the Insurers (which is refuted by the Insurers), these materials must be produced pursuant to the "at issue" doctrine. See, e.g., AIU Ins. Co. v. TIG Ins. Co., 2008 U.S. Dist. LEXIS 96693, at *12 (S.D.N.Y. Nov. 25, 2008); Royal Indem. Co. v. Salomon Smith Barney, Inc., 2004 N.Y. Misc. LEXIS 1052, at *24-25 (N.Y. Sup. Ct. June 29, 2004). The NFL Parties have placed the underlying defense and settlement materials at issue by suing the Insurers in this Coverage Action for more than $1 billion in defense and indemnity costs, claiming various breaches of contract by the Insurers, placing the reasonableness of the Settlement at issue and, with respect to certain Insurers, alleging bad faith for the failure to consent to the Settlement.

In his Order, Special Referee Dolinger incorrectly held that the requested materials are not presently subject to at-issue waiver, relying primarily upon a purported representation by the NFL Parties that they would not "rely for [their] claims or defenses on the advice or evaluations of [their] attorneys." See Ex. 8 at 20. As a threshold matter, what the NFL Parties ***actually*** said in their briefing was that they did not assert that "their attorneys' privileged evaluation of the underlying claims is relevant or admissible in proving the reasonableness of settlement." See Ex. 3 to Carroll Aff. at 31. That is far short of saying that they are irrelevant to ***any*** issue, including notably disclosures to Insurers relating to their bad faith claims. The Insurers submit that the materials are "at issue" now and that delaying their production until late in the case would be unduly prejudicial to the Insurers' ability to prepare for trial.

In support of his ruling, Special Referee Dolinger relied heavily upon Deutsche Bank Trust Co. v. Tri-Links Inv. Trust, 43 A.D.3d 56, 837 N.Y.S.2d 15 (1st Dep't 2007), which held that "at issue wavier occurs 'when the party has asserted a claim or defense that he intends to prove by use of the privileged materials.'" Id. at 64 (quoting North River Ins. Co v. Columbia

Cas. Co., 1995 WL 5792, at *6 (S.D.N.Y. Jan. 5, 1995)). The Deutsche Bank court noted that the insured – who, like the NFL Parties, sought indemnification for a settlement – had "placed at issue the reasonableness of the amounts it spent on the defense of that matter and of the amount it paid . . . in settlement." Id. at 65. However, the court concluded that the bank did not need to rely upon the legal advice, analysis, or mental impressions of its attorneys in that case because there was what Special Referee Dolinger described as a "plethora of information that was available or potentially available to the parties on th[o]se issues." See Ex. 8 at 19.

In stark contrast to the virtually non-existent universe of substantive documents produced by the NFL Parties in this Coverage Action, the insured in Deutsche Bank had the ability to prove the reasonableness of its settlement by relying upon 120 boxes of documents already produced, including not only publicly filed documents from the litigation, but also, "all correspondence exchanged among the parties and concerning [the related] action, all third-party document productions in that action, and transcripts of all depositions taken therein," as well as "reports by experts retained by the opposing sides in the [underlying] action assessing the amount of damages that potentially could be awarded." Deutsche Bank, 43 A.D.3d at 65. That "plethora of information" available to the parties in Deutsche Bank is entirely distinguishable from the dearth of meaningful documents produced by the NFL Parties in this case. The NFL Parties' production consists almost entirely of publicly-available documents filed in the MDL Action, news articles collected by the NFL on a daily basis, and documents relating to insurance policies issued to the NFL Parties.

Unlike the insured in Deutsche Bank, the NFL Parties have not produced any records reflecting the legal work performed by Paul Weiss (or other of its defense attorneys) in the MDL Action, any correspondence exchanged among the parties in the MDL Action and during the

settlement process (which would not be subject to attorney-client privilege), or any reports by experts retained to assess potential damages. Moreover, the NFL Parties cannot possibly produce any document productions or deposition transcripts from the MDL Action because they do not exist. The NFL Parties surrendered their rights to conduct discovery in the MDL Action in order to enter into the Settlement for which they now seek reimbursement from the Insurers.

In the absence of a developed underlying record, the NFL Parties have no choice but to rely upon materials from the underlying defense file to attempt to prove their case for coverage, including the reasonableness of the Settlement as it pertains to both the NFL and NFL Properties. Special Referee Dolinger suggested that the parties may rely upon the public record in the MDL Action to litigate the coverage issues and that the Insurers may conduct "targeted, non-party discovery" to test the reasonableness of the Settlement. See Ex. 8 at 21. While the Insurers intend to continue in their pursuit of non-party discovery, it is not a substitute for the most relevant source of information on the issue—the NFL Parties' own defense and settlement materials evaluating the claims, defenses, liability, and damages.

The Insurers appreciate the Special Referee's acknowledgment that if "relevant circumstances change so as to suggest that the League is planning to utilize privileged documents or testimony about counsel's assessments of the MDL cases or the settlement, [the Special Referee] will be prepared to re-examine the question of at-issue waiver." See Ex. 8 at 25. However, the Special Referee's "wait and see" proposal is inefficient and prejudicial to the Insurers' ability to prepare their cases. To conduct meaningful depositions of fact witnesses and even experts, the Insurers need the underlying files now. As set forth in detail in the Insurers' motion papers to the Special Referee, there is sufficient evidence before the Court at this time to find that the NFL Parties have placed the underlying defense files at issue in this Coverage

Action. There is no reason to defer on this issue, which could have the undesirable effect of re-opening paper and deposition discovery during the dispositive motion stage of the case.

The NFL Parties must be compelled to produce the underlying defense and settlement materials by operation of the cooperation clauses in their insurance contracts, which production is permitted and protected by the common interest doctrine. Even to the extent this Court finds that theory unpersuasive, the NFL Parties have placed the requested materials "at issue" in the Coverage Action so as to waive any purported privileges or protections as to the Insurers.[5]

IV. CONCLUSION

Based upon the foregoing, the Insurers respectfully request that the Court reverse the Special Referee's Order denying their motion to compel the underlying litigation and settlement materials and instruct the NFL Parties to produce these relevant documents by a date certain.

Dated: March 14, 2019
New York, New York

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[5] To the extent that the NFL Parties are required to produce the defense and settlement materials in discovery, any purported restrictions upon the use of these materials in litigation claimed by the NFL Parties based upon confidentiality agreements entered between them and certain Insurers, and/or any protective order arising therefrom, will be moot. See Ex. 8 at 37, n.29.

List of Insurers

TIG Insurance Company

The North River Insurance Company

United States Fire Insurance Company

Discover Property & Casualty Insurance Company

St. Paul Protective Insurance Company

Travelers Casualty & Surety Company

Travelers Indemnity Company

Travelers Property Casualty Company of America

Allstate Insurance Company

American Guarantee and Liability Insurance Company

Arrowood Indemnity Company

Bedivere Insurance Company

Continental Insurance Company

Continental Casualty Company

ACE American Insurance Company

Century Indemnity Company

Indemnity Insurance Company of North America

California Union Insurance Company

Illinois Union Insurance Company

Westchester Fire Insurance Company

Federal Insurance Company

Great Northern Insurance Company

Vigilant Insurance Company

Munich Reinsurance America, Inc.

Westport Insurance Corporation

XL Insurance America Inc.

XL Select Insurance Company